No. 02-1541

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

REPLY BRIEF FOR THE PETITIONER

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SUMMARY OF REPLY ARGUMENT

That the State, Tovar, the majority and dissent of the Iowa Supreme Court employ the same U.S. Supreme Court precedent for their disparate positions underscores the need for granting the State's Petition for Certiorari. Current Supreme Court precedent does not resolve the issue here: what the Sixth Amendment requires for a valid waiver of counsel at the guilty plea stage.

The divergent treatment of this issue by the twenty seven jurisdictions which Tovar and the State discuss emphasizes the value of granting the Petition for Certiorari. Although Tovar and the State quarrel over the contours of this split, a substantial disagreement among the lower courts has developed over the last several decades.

Granting certiorari will ease the significant practical difficulties springing from the Iowa Supreme Court's decision, as well as those which emerge from a lack of uniformity among the states and federal circuits. Without direction from this Court, a plurality of states and federal circuits cannot honor settled convictions from the remaining jurisdictions for purposes of enhancing present offenses.

I. SUPREME COURT PRECEDENT DOES NOT DIRECTLY RESOLVE THE ISSUE IN DISPUTE.

The parties – and the courts below – refer to a discrete universe of Supreme Court precedent, including *United States v. Ruiz*, 536 U.S. 622 (2002); *Custis v. United States*, 511 U.S. 485 (1994); *Nichols v. United States*, 511 U.S. 738 (1994); *Patterson v. Illinois*, 487 U.S. 285 (1988); *Faretta v. California*, 422 U.S. 806 (1974); *Argersinger v. Hamlin*,

407 U.S. 25 (1972); *Boyd v. Dutton*, 405 U.S. 1 (1972); *Brady v. United States*, 397 U.S. 742 (1970); *Von Moltke v. Gillies*, 332 U.S. 708 (1948).

Of these, only the *Von Moltke* plurality opinion addresses what the Sixth Amendment requires a court to discuss with a defendant pleading guilty *pro se*. 332 U.S. at 724. That case did not so much address waiver of counsel as a plea to a crime the defendant did not commit. *Von Moltke* involved prolonged deprivation of access to counsel, incorrect legal advice by FBI attorneys, long-term pre-trial incarceration, as well as a failure to explain the elements of the offense or the possibility the death penalty could be imposed. 332 U.S. at 711-21.

Much of *Von Moltke's* instruction is, however, already given to defendants in Iowa and elsewhere as part of the guilty plea colloquy which assures the court that a factual basis for the charge exists, that the defendant understands the nature of the offense and its elements, the range of possible punishments, the right to counsel, and the several other constitutional rights a defendant waives by pleading guilty. *See, e.g.,* Iowa R. Crim. P. 2.8(2)(b).

The remaining authorities discussed either peripherally underscore the importance of plea counsel, *Custis*, 511 U.S. at 494-95; *Brady*, 397 U.S. at 748, fn. 6, or they address waiver of counsel outside the plea context, *compare Patterson*, 487 U.S. at 298 (post-indictment questioning by police) *with Faretta*, 422 U.S. at 835-36 (assertion of right to self-representation at trial).

From these authorities, however, the parties, the majority and dissent at the Iowa Supreme Court, and the Iowa Court of Appeals have extracted thoughtful yet diametrically opposed conclusions.

If Tovar is correct that these authorities compel the result the narrow majority of the Iowa Supreme reached, then that teaching has escaped a significant number of federal and state jurisdictions. If the State is correct, on the other hand, that the law remains unsettled after *Von Moltke*, *Faretta*, and *Patterson*, among others, then the absence of direct precedent explains the disparate treatment of the issue among the lower courts.

Either position warrants Supreme Court review.

II. THE SPLIT AMONG LOWER COURTS HAS BECOME WELL-DEVELOPED AND WARRANTS SUPREME COURT REVIEW.

Although the State disputes Tovar's characterization of a majority rule, his brief acknowledges that a substantial disagreement among the lower courts has developed over the last several decades. For the record, however, eight of the authorities which Tovar cites do not necessarily conform to the rule he advances.

The Third Circuit, for example, equates the requirements for waiver of counsel with those for a voluntary and intelligent guilty plea itself. *United States ex rel. McDonald v. Commonwealth of Pennsylvania*, 343 F.2d 447, 451 (3rd Cir. 1965). *United States v. Solemo*, concerned with waiver of counsel at sentencing, does not detract from the *McDonald* rule. 61 F.3d 214, 219 (3rd Cir. 1995).

Tovar's reference to *Shafer v. Bowersox*, filed after the State's Petition here, raises the prospect of a split within the 8th Circuit. *Shafer* relies on the *Von Moltke* factors for a valid waiver of counsel at a guilty plea. *Shafer*, 329 F.3d 637, 648 (8th Cir. 2003). A three-judge panel reversed

Shafer's first-degree murder conviction noting the plea colloquy failed *Von Moltke* as well as *Faretta*. *Id.*

In *United States ex rel. Miner v. Erickson*, another three-judge panel also relied in part on *Von Moltke*, but reached a contrary result. *Miner*, 428 F.2d 623, 628 (8th Cir. 1970). There, the trial court gave similar advisories to the defendant: the nature of the charges, possible punishments, desirability of counsel, and entitlement to court appointed counsel. *Id.*

Finally, the State disputes Tovar's position that several of the state authorities conform to the Iowa Supreme Court's ruling. Rather they either assert the *Von Moltke* factors, *see Garnick v. Miller*, 403 P.2d 850, 853 (Nev. 1965); deal with a competency question under *Godinez v. Moran*, 509 U.S. 389 (1993), *State v. Pollard*, 657 A.2d 185, 189-90 (Vt. 1995); or enunciate a rule which complies with Iowa's rule for validly accepting a guilty plea, *see People v. Christensen*, 555 N.E.2d 422, 426 (Ill. Ct. App. 1990), *State v. Fulp*, 558 S.E.2d 156, 159-60 (N.C. 2002), *State v. Arguelles*, 63 P.3d 731, 750 (Utah 2003).

Tovar and the State discuss a combined total of twenty-seven jurisdictions. Some of these jurisdictions hold the same *Faretta* warnings which a defendant receives prior to trial apply when the defendant chooses to forego trial and enter a guilty plea *pro se*. *See, e.g., Swenson v. Municipality of Anchorage*, 616 P.2d 874, 878 fn. 5 (Alaska 1980); *Clary v. State*, 818 So.2d 686, 687 (Fla. Dist. Ct. App. 2002); *Shelton v. State*, 390 N.E.2d 1048, 1049 (Ind. Ct. App. 1979); *Watts v. State*, 556 S.E.2d 368, 370 (S.C. 2001).

Others jurisdictions say no, *Faretta* is inapplicable. *See, e.g., Stano v. Dugger*, 921 F.2d 1125, 1145 (11th Cir. 1991); *State v. Maxey*, 873 P.2d 150, 154 (Idaho 1994);

People v. Schneider, 429 N.W.2d 845 (Mich. Ct. App. 1988); *State v. Strain*, 585 So.2d 540, 544 (La. 1991); *State v. Cashman*, 491 N.W.2d 462, 465 (S.D. 1995); *Hatten v. State*, 71 S.W.3d 332, 334 (Tex. Ct. Crim. App. 2002).

Still more jurisdictions hold that defendants validly waive counsel when they know they are entitled to counsel, the elements of the offense, maximum and minimum possible punishments, subpoena powers, the right to confront witnesses, the right to testify, the right against self-incrimination, the terms of a plea agreement (if any) and the right to appeal. *See, e.g., In re Johnson*, 398 P.2d 420, 427 (Cal. 1965); *State v. Green*, 178 N.W.2d 271, 272-73 (Neb. 1970). Further discussion of the pitfalls of self-representation – particularly for lightly punished, simple crimes like operating while intoxicated – imposes an "idle and time-wasting ritual," *In re Johnson*, 398 P.2d at 427, particularly when this Court has recognized that

> the Constitution . . . does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.

Ruiz, 534 U.S. at 630.

Given the substantial disagreement among lower courts, this Court ought to grant the Petition for Certiorari.

III. POLICY CONSIDERATIONS SUGGEST THE IOWA SUPREME COURT'S COLLOQUY IS UNNECESSARILY BURDENSOME.

To be sure, the Sixth Amendment right to counsel is not a tool "to ease the burden on prosecutors seeking convictions." Respondent's Br. in Opposition 22. This position, however, misapprehends the State's purpose in seeking review. The issue here has received extensive, albeit inconsistent, treatment nationally. The present case offers an opportunity to advise Iowa and the other jurisdictions of the Sixth Amendment's requirement for a valid waiver of counsel at a guilty plea.

Effectively, the colloquy now required in Iowa improperly discourages defendants from pleading guilty without an attorney by implying that an independent source of legal advice may uncover a technical defense, such as a suppression issue. *See Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990) (noting the "thin line" courts must toe "[b]ecause self-representation necessarily entails the waiver of the Sixth Amendment right to counsel, a trial court can commit ... error by either improperly granting a request to proceed *pro se* – and thereby depriving the individual of this right to counsel – or by denying a proper assertion of the right to represent oneself, and thereby violating *Faretta*."); *State v. Tovar*, 656 N.W.2d 112 (Iowa 2003) (Carter, J., dissenting) (noting majority's speculation about "unidentified potential defenses that an able lawyer might have advanced").

Where a defendant, like Tovar, enters an otherwise knowing and intelligent guilty plea – knowing his guilt, the elements of the crime, the possible punishments and the full range of waived constitutional rights – the Iowa

Supreme Court's requirement of additional inquiry into factual or legal defenses creates an unnecessary burden.

Tovar notes the look-back provisions for enhancing OWI or harassment offenses. Obtaining records ten or twelve years old from the other ninety-eight Iowa counties or other forty-nine States is a significant undertaking, as this Court has recognized. *See Custis*, 511 U.S. at 496.

If the Sixth Amendment does not mandate the extensive cautionary advisory which the Iowa Supreme Court has imposed, then the administration of justice is needlessly frustrated, particularly since convictions from numerous other states are now effectively null for enhancement purposes in Iowa prosecutions.

CONCLUSION

For these reasons, the State respectfully asks that this Court grant the Petition for Certiorari.

Respectfully submitted,

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